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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 814.

PITTSBURGH-DES MOINES STEEL COMPANY,
a co-partnership,
JOHN E. JACKSON, and
PITTSBURGH-DES MOINES COMPANY,
a corporation,
Petitioners,

vs.

EILEEN MORAN,
Administratrix of the Estate of
Patrick J. Moran, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MARVIN C. HARRISON,
HARRISON, THOMAS, SPANGENBERG & HULL,
1500 Guardian Building,
Cleveland, Ohio,

PREMO J. COLUMBUS,
Law & Finance Building,
Pittsburgh, Pa.,
Attorneys for Respondent.

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INDEX.

Counter Statement of Questions Presented..... 1

Counter Statement of Facts..... 3

Question No. I—Under the law of Ohio, is a plant for the liquefaction of natural gas, and the storage of five thousand tons of the liquid gas in the middle of a large city, an "absolute nuisance," or what is sometimes termed a "nuisance per se"? 12

Question No. II—If the answer to Question No. I is YES, are the builders of the tank for the storage of such liquefied gas liable as the CREATORS of such an "absolute nuisance," for the harm caused by a rupture of one of the tanks at a time when they are not in possession or control of the tanks? 12

Question No. III—Regardless of the question of the liability under I and II, was there sufficient evidence in the record to show that the builders of the tanks (defendants below) were negligent in the design or construction of the storage tank which ruptured? 13

Question No. IV—If the answer to Question No. III is YES, was there also sufficient evidence in the record to show that under the procedural rules of Pennsylvania the negligence in construction and design of the storage tanks was the proximate cause of the rupture of the tank? 13

Question No. V—Assuming that the evidence proved that the storage Tank No. 4 was negligently designed and constructed, and that it ruptured for that reason, does the law of Ohio authorize recovery on the part of those persons who are harmed, who were employees of the purchaser of the tank? 14

1. The law of Ohio, with respect to structures—so far as the MacPherson rule is concerned is the same for structures as for chattels and is accurately stated in Sec. 385 of the Restatement of the Law of Torts..... 15

2. Under recent decisions of the Ohio Supreme Court huge structures, like Tank No. 4, are chattels 17

In Conclusion 18

TABLE OF AUTHORITIES.

Cases.

Bailey v. Gas Co., 4 C. C. 471 (affirmed without opinion by the Ohio Supreme Court, 52 O. S. 623, 44 N. E. 1130).....15, 16

Devlin v. Smith, 89 N. Y. 470.....15, 16

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188 (1938) 15

MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F 696 (1916).....14-15

Morris v. Woodburn, 57 Oh. St. 330; 48 N. E. 1097; 1897 12

Oil Co. v. Zangerle, 144 Oh. St. 523, 60 N. E. 2d 59 17

Shindelbeck v. Moon, 32 Oh. St. 264, 30 A. R. 584.. 12

Straight v. Goodrich Co., 354 Pa. 391, 47 A. 2d 605 (1946) 14

Taylor v. City of Cincinnati, 143 Oh. St. 426; 55 N. E. 2d 724; 155 A. L. R. 44; 1944..... 12

Zangerle v. Oil Co., 144 Oh. St. 506, 60 N. E. 2d 52 17

Zangerle v. Steel Corp., 144 Oh. St. 529, 60 N. E. 2d 170 17

Text.

Restatement of the Law of Torts, Sec. 385..... 15

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

The only question before the Circuit Court of Appeals, in view of the fact that there was a directed verdict, was whether under the evidence in the Record, there was a question for the determination of the jury. The trial judge said **no**. The Circuit Court of Appeals said **yes**, and reversed and remanded for a new trial.

This primary question involves five subordinate questions. Four of them depend on substantive Ohio law; and one concerns the procedural law of Pennsylvania, viz:

I.

Under the law of Ohio, is a plant for the liquefaction of natural gas, and the storage of five thousand tons of the liquid gas in the middle of a large city, an "absolute nuisance," or what is sometimes termed a "nuisance *per se*"?

II.

If the answer to Question No. 1 is **yes**, are the builders of the tanks for the storage of such liquefied gas liable as the **creators** of such an "absolute nuisance" for harm caused by a rupture of one of the tanks, at a time when they are not in possession or control of the tanks?

III.

Regardless of the question of liability under I, and II, was there sufficient evidence in the record to show that the builders of the tanks (defendants below) were negligent in the design or construction of the storage tank which ruptured?

IV.

If the answer to Question No. III is **yes** was there also sufficient evidence in the record to show that under the procedural rules of Pennsylvania the negligence in construction and design of the storage tanks was the proximate cause of the rupture of the tanks?

V.

Assuming that the evidence proved that the storage tank No. 4 was negligently designed and constructed, and that it ruptured for that reason, does the law of Ohio authorize recovery on the part of those persons who are harmed, who were employees of the purchaser of the tank?

The Circuit Court of Appeals did *not* decide the first question; but *did* decide the second adversely to the contentions of this respondent.

The last three questions, it decided in favor of the contentions of this respondent, and therefore reversed the trial court, and remanded for a new trial.

COUNTER STATEMENT OF FACTS.

This was an action for damages for wrongful death. It was brought by the widow of one of the many men killed in the great East Ohio Gas fire of October 20th, 1944, in the City of Cleveland, Ohio.

It was brought against the builders of the storage tank (one of four such tanks) which ruptured and released about two thousand tons of liquefied natural gas, and produced a tremendous and catastrophic fire that devastated a large area in Cleveland.

The defendants designed and constructed the tank in which this liquefied gas was stored. They completed their construction work thirteen months before the day of the disaster, and turned over possession of it to The East Ohio Gas Company (frequently referred to in this brief as East Ohio) for whom it was built. They had been paid in full, and were out of possession.

Plaintiff claims a right of recovery from defendants upon either or both of two separate propositions.

(a) The plant for the storage of liquefied natural gas was (under the law of Ohio), an "absolute nuisance" or what is sometimes termed a "nuisance *per se*"; and the defendants as the creators of this absolute nuisance remained liable for all harm caused thereby (without the necessity of any proof of negligence) so long as the nuisance continued, and irrespective of the fact that they were out of possession.

(b) The defendants were negligent in the construction of the tank, in that it was so constructed, in design, in materials, and in workmanship, as to be imminently and inherently dangerous; and the disaster was the direct result of this negligence.

On the day of the disaster, October 20, 1944, East Ohio had in operation its plant for the Liquefaction, Storage, and Re-gasification of natural gas (frequently referred to as the L.S.R. plant).

It was the first, and the only plant of the kind, in the world.

The liquid gas, at a temperature of about 260 degrees below zero, Fahrenheit, was stored in four huge tanks.

On the afternoon of October 20th, 1944, the contents of the largest of these tanks (No. 4) were observed spurting out. Within two or three minutes the entire two thousand tons of liquid in that tank poured out. The liquid immediately emitted tremendous clouds of inflammable and explosive vapors. Great fires broke out, and in the vast conflagration that followed, Patrick J. Moran, one of the employees of East Ohio, was burned to death. He had nothing to do with the L.S.R. plant, but worked for East Ohio near by. He left a widow and several little children, on whose behalf this action was filed.

The City of Cleveland, Ohio, is a city of about one million people (44a).

Its gas supply comes from East Ohio, a public utility which sells natural gas throughout the entire city, both to private homes and to industrial users. It owns and operates a substation substantially in the center of Cleveland, known as its No. 2 Works (43a). This No. 2 Works consists of about ten acres of land which is surrounded by railroad lines, industrial plants, and private homes.

For some years, East Ohio has been troubled by the fact that in the bitter cold spells of winter, its gas supply has sometimes proved inadequate for several days at a time. In 1939, East Ohio became interested in a scheme for the storage of an immense reserve supply of natural gas by liquefying it, and then storing it in tanks which were in effect huge thermos bottles.

The basic difficulty in storing it arose from the fact that liquefied natural gas is an extremely cold fluid. Its temperature, depending on the varying amounts of methane and other gases, is between 250 and 260 degrees below zero, Fahrenheit. At this temperature, ordinary steel is extremely brittle, almost as brittle as glass (Exhibits 79, 82; 190a, 192a).

However, a small pilot plant was built in 1939 and operated for a few weeks.

The apparent success of this pilot plant was such as to cause East Ohio to decide to solve its problems by the erection of a liquefaction plant with some large tanks for the storage of the liquefied gas. This plant was built at its No. 2 works, in the center of Cleveland.

Generally speaking, the plant for the liquefaction, storage, and re-gasification of this natural gas involved the erection of a compressor building, a heat-exchanger, three large tanks for the storage of the liquid, and steam boilers to heat the liquid and regasify it when needed. The motors for compressing the various gases provided 4000 horsepower (167a).

The general process of liquefaction of the gas was by using what is known as the "cascade" system. Water was used to cool ammonia. Then cold ammonia was used to cool ethylene gas. And finally the cold ethylene gas was used to cool and help liquefy the natural gas (166a).

The natural gas, when it entered the plant, was compressed by the motors in the compressor house to about six hundred pounds per square inch (Exhibits 82, 83). This of course rendered it extremely hot. The heat of compression was taken out of it by water, and it was then chilled by contact with the cold ethylene to a temperature of —150° F. below zero. Then when the gas which was still at six hundred pounds pressure was permitted to expand to atmospheric pressure, it was chilled by this expansion so much further that a large part of it was immediately liquefied. This liquid was then run into

one of the storage tanks, and the portion which had not liquefied was run through the same cycle again (Exhibit 63, p. 10). Inasmuch as about 600 cubic feet of natural gas could be stored as one cubic foot of liquid, the economies of this type of storage are obvious. In this manner, about two and one half million cubic feet of natural gas could be liquefied in twenty-four hours. And since the three original tanks had a combined storage capacity of about one hundred and fifty million cubic feet of gas, the liquefaction plant, if running full time, could fill the three tanks in about two months.

As already stated, the general theory of the plan was that by having available such a supply of liquid gas, whenever an extremely cold spell should come along, the liquid could be run out, regasified by the heat from steam coils, and an immense additional amount of gas could thus be made available for the few days of the cold spell. Then when the cold spell was over, the reserve could be accumulated again (Exhibits 82, 83).

The original L.S.R. plant was finished late in the year of 1940 and the storage of liquefied gas began in February of 1941. It served its purposes so satisfactorily during the remainder of that winter that in the following year East Ohio decided to increase its storage capacity by building another—or fourth—storage tank.

Each of the three original tanks (commonly referred to as Nos. 1, 2, and 3) was in shape a huge round ball, 57 feet in diameter, and was designed to hold substantially fifty million cubic feet of natural gas, or a weight of liquid, when the gas had been liquefied, of about one thousand tons.

The proposal was to construct a fourth tank which would be twice as large as any one of the first three.

Accordingly East Ohio approached the defendants, as tank builders, and requested them to design such a tank.

In response to this request, the defendants prepared two alternative designs. One was for a spherical tank of the same general design as the first three, except that it would have the capacity for twice as much gas. The other was for a tank which is technically called a "toro-segmental" tank, but which was substantially cylindrical in form and has been referred to throughout the record in that manner.

The cylinder was considerably cheaper than the sphere, and therefore the defendants advised East Ohio to select the cylinder.

Accordingly the cylinder tank was built by the defendants. Its entire design, as well as all the specifications of materials, and the standards of workmanship were the responsibility of the defendants alone (52a).

The erection work began August 7, 1942 and was completed in the latter part of May of 1943. All of the fabrication of the steel plates, and the welding of the plates into the tank, as well as the choice of the steel alloy and the insulating materials was entrusted to the defendants.

Tank No. 4 was filled, for the first time, on November 5th, 1943, just eleven and one half months before the disaster.

Tank No. 4 and the three other tanks were used during the winter that followed, and they then stood dormant during the spring and summer of 1944. By reason of the insulation between the two walls—a three foot layer of insulation—the amount of evaporation even during the hot summer months was not very great. Indeed, it was estimated by defendants (Ex. 82, p. 39) that it would take about two years for all of the contents of one of the tanks to evaporate completely.

When the summer season was over, East Ohio on September 11, 1944 started up the L.S.R. plant and began the task of filling all of the four tanks. On October 20, 1944, and about 2:00 P. M. this was finished, and the

employees of East Ohio began the process of shutting down. This was a somewhat complicated procedure and required from an hour to an hour and a half or two hours for its completion (80a). The reason for this lay in the fact that under the necessary reversal of the "cascade system," the ammonia had to be pumped out of the system into the ammonia tanks, and the ethylene gas had to be pumped out of the system into its tanks (79a, 80a).

About 2:45 P. M. while the process of shut down was proceeding in the usual and normal manner, the walls of No. 4 tank (the big cylindrical tank) suddenly split open, streams of liquid and white vapor were seen to spurt out, and within two or three minutes (127a) the entire contents of two thousand tons of liquid gas poured out. Tremendous volumes of explosive vapors and gas were of course given off at once. Within a few minutes the vapors caught fire, and a hideous holocaust of destruction ensued in which a large area of Cleveland was destroyed, and a great many people were killed.

One of the men who was burned to death was plaintiff's decedent, Patrick J. Moran. At the time of the fire he was working for East Ohio, although he had nothing to do with the L.S.R. plant. He chanced to be working, that day, in the No. 2 Works, and was caught and engulfed in the sea of fire, and killed as were scores of others.

The plaintiff pleaded in her complaint that the defendants, in their design of the structure, and in their choice of materials, and in the workmanship used, had been guilty of negligence in a great many different respects. She offered an immense mass of evidence to support fourteen of these separate specifications, and the Circuit Court of Appeals found as a fact that there was evidence to support each one of them:

> "We at first thought some of them could be disregarded, but subsequent examination of the testimony shows there is some basis for each one."

1. The Use of a dangerous Cylindrical Form for Tank No. 4, instead of the relatively safer Spherical form.

There was evidence to establish that the cylindrical form was dangerous and caused stresses that were difficult to determine, and rendered rupture much more likely.

2. A Defective and Dangerous Design of the Safety Valve Assembly at the top of Tank No. 4.

The evidence indicated that this design caused one part of the top of the tank to be much warmer than other parts. This was due to the heat brought down by the metal connections to the outside air, and created immense strains at that "hot spot" in the inner shell. It was also established that the original rupture began at this very point, and was traced thence through other parts of the tank.

3. A Defective Design of the bottom of Tank No. 4 which failed to provide adequate ventilation for the bottom.

On this point, the evidence established that ice was constantly forming on the bottom of the steel tank, indicating inadequate ventilation.

4. A Defective Design of the lower part of Tank No. 4 in permitting the stresses to be dangerously high and without an adequate factor of safety.

The evidence showed that adequate design called for a factor of safety of not less than *four*. At one point, the actual design had a safety factor of a very small fraction more than *one*.

5. A Defective Design in failing to provide any means for keeping the liquid contents of No. 4 sufficiently stirred or mixed to avoid the hazard of dangerous "bumping" or superheating.

The evidence showed that at the temperature of —260° F. molecular motion is much reduced, and the haz-

ards of "bumping" or superheating, and consequent shock, are greatly increased; and that to avoid this mechanical stirring is needed.

6. The use of Rock Wool as insulating material for No. 4 tank.
7. The failure to use Cork as insulating material.

Cork was used as the insulation for the first three tanks. Rock wool was used in Tank No. 4, even though cork was specified, and although the evidence established that cork was available. As a result more than five hundred tons of rock wool was rammed into the insulating spaces where 185 tons of cork was specified; and this rock wool was perpetually settling, and caused inadequate, and uneven insulation, as proved by the frost which constantly formed on the sides of No. 4 tank.

8. The use of a dangerously brittle material (3½% Nickel Steel) for the construction of the inner shell of tank No. 4.
9. The failure to make any tests whatever of the impact strength, or brittleness, of the Nickel Steel used for the inner shell of No. 4 tank.
10. The failure to make separate tests of each of the seven heats of steel used in fabricating the inner shell of No. 4 tank.
11. The use of two particular heats of steel in the fabrication of the inner shell of No. 4 tank which were so brittle as to be utterly unfit for use.

The evidence showed that in their patents which they had taken out on the construction of tanks for the storage of liquefied gas, the defendants had emphasized the absolute necessity of having a steel which would remain tough, even at the temperature of —260° F. and that steel for such tanks must have a Charpy impact strength of at least 10 foot pounds.

The steel which was used in No. 4 tank was not tested by the defendants—nor by anybody else—before

the tank was built. After the disaster it was tested and was found to be much less tough and more brittle than the defendants in their patents had stated was essential.

And **two of the seven heats of steel which were used by the defendants in its construction were so brittle, that they had just about the same brittleness as plate glass.**

12. Inadequate standards or requirements with respect to the welding of tank No. 4.
13. Improper workmanship in the welding of tank No. 4.

The written requirements as to the standards of the welding were substantially different as between the first three spherical tanks, and the last No. 4 tank; and the difference was that the requirements were much relaxed when No. 4 tank was welded.

Furthermore, after the disaster had taken place, and the wreckage was examined by welding engineers, many indications of complete failure of weld, and proof of "conclusive and irrefutable evidence of poor workmanship" were found. (Ex. 59) Of twenty one specimens of welds tested by The Pittsburgh Testing Laboratory, defects were found in all but one specimen.

14. The failure to heed obvious warning signs of danger.

The defendants, at the time they turned the tank over to East Ohio knew that there was an unexplained "hot spot" at the center of the top of the tank (the very place where eventually the rupture of the tank began as proved by the engineer who traced the progress of the line of rupture).

They also knew that the insulation was failing, and causing ice spots on the outside of the tank; that masses of ice had formed on the bottom; that in the effort to maintain insulation, they had been compelled to jam five hundred tons of rock wool into the spaces designed to receive only 185 tons of cork.

QUESTION NO. I.

Under the law of Ohio, is a plant for the liquefaction of natural gas, and the storage of five thousand tons of the liquid gas in the middle of a large city, an "absolute nuisance," or what is sometimes termed a "nuisance per se"?

The Circuit Court of Appeals did not answer this question specifically, but indicated that the answer should probably be **Yes.**

QUESTION NO. II.

If the answer to Question No. I is YES, are the builders of the tank for the storage of such liquefied gas liable as the CREATORS of such an "absolute nuisance," for the harm caused by a rupture of one of the tanks at a time when they are not in possession or control of the tanks?

The Circuit Court of Appeals answered this question **no**; despite the contention of the plaintiff-respondent that under the Ohio decisions the storage of the liquefied gas was an "absolute nuisance" (*Taylor v. City of Cincinnati*, 143 Oh. St. 426; 55 N. E. 2d 724; 155 A. L. R. 44; 1944); and the further contention that under the law of Ohio, the creator of a nuisance continues liable for the nuisance, so long as it continues. (*Morris v. Woodburn*, 57 Oh. St. 330; 48 N. E. 1097; 1897; and *Shindelbeck v. Moon*, 32 Oh. St. 264, 30 A. R. 584.)

If certiorari should be granted, we would hope that this Court would regard it as appropriate to re-examine these two questions.

QUESTION NO. III.

Regardless of the question of the liability under I and II, was there sufficient evidence in the record to show that the builders of the tanks (defendants below) were negligent in the design or construction of the storage tank which ruptured?

On this point the defendants-petitioners made no serious attempt in the brief or in argument in the Circuit Court of Appeals to controvert the contentions of plaintiff-respondent as to the overwhelming proof of negligence in the various respects charged.

QUESTION NO. IV.

If the answer to Question No. III is YES, was there also sufficient evidence in the record to show that under the procedural rules of Pennsylvania the negligence in construction and design of the storage tanks was the proximate cause of the rupture of the tank?

Inasmuch as the case was filed and tried in the District Court for the Western District of Pennsylvania, the test as to the adequacy of the proof on the issue of proximate cause is claimed by the petitioners to be measured and determined under the state rule of Pennsylvania.

The Circuit Court of Appeals conceded that this was true, but pointed out that in the maze of Pennsylvania decisions it is difficult to be sure what is meant by the Pennsylvania rule that a plaintiff must "*individuate*" as to the cause of harm.

It pointed out that Pennsylvania decisions can be found which support any one of several possible theories of such "individuation"; but that the evidence in our record was such as to require a jury consideration under any one of these possible rules.

Without a long analysis of the Pennsylvania decisions, it is obvious from those cited by the petitioners

as well as the many others cited by the Circuit Court of Appeals that the Pennsylvania rule, despite the phrase in respect to "individuation," means only the conventional rule that a jury may not be permitted to "speculate" about causation when there is nothing in the record which warrants rational persons in coming to a definite view one way or the other. This is illustrated by *Straight v. Goodrich Co.*, 354 Pa. 391, 47 A. 2d 605 (1946). This was an action for damages for wrongful death. The decedent fell into an open elevator shaft, and a radiator fell also on top of him. No eye witness was available to establish how or why he fell.

Held: The issues of fact were for the jury.

> "Despite dicta to the contrary in some of our cases, it is not the rule that circumstantial evidence to establish negligence need exclude everything which the ingenuity of counsel may suggest as having possibly caused or contributed to the injuries or death (*Strobel v. Park*, 292 Pa. 200, 140 A. 827).
>
> Since proof to a degree of absolute certainty is rarely attainable, in any litigated factual controversy, the law requires only that the evidence as to the facts be enough to satisfy reasonable and well balanced minds that it was the one on which plaintiff relies." (Emphasis ours)

QUESTION NO. V.

Assuming that the evidence proved that the storage Tank No. 4 was negligently designed and constructed, and that it ruptured for that reason, does the law of Ohio authorize recovery on the part of those persons who are harmed, who were employees of the purchaser of the tank?

It is on this point, that petitioners principally seek certiorari.

Briefly stated, it is their contention that although Ohio follows the doctrine of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F 696

(1916) so far as it relates to *chattels,* it does not apply that doctrine to permanent *structures*; that in fact the Ohio law is specifically to the contrary; and that therefore when the Circuit Court of Appeals held that the same doctrine applies in Ohio to a structure like Tank No. 4 as if it were an automobile wheel, it was in error, and violated the rule laid down in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938).

To this claim, there are two answers.

1. The law of Ohio with respect to structures—so far as the *MacPherson* rule is concerned, is the same for structures as for chattels and is accurately stated in Sec. 385 of the *Restatement of the Law of Torts.*

2. Under recent decisions of the Ohio Supreme Court, huge structures like the Tank No. 4 are chattels.

1. The law of Ohio, with respect to structures—so far as the MacPherson rule is concerned is the same for structures as for chattels and is accurately stated in Sec. 385 of the Restatement of the Law of Torts.

In order to attempt to prove their point that the law of Ohio was misconceived by the Circuit Court of Appeals, the petitioners cite and rely principally on the old case of *Bailey v. Gas Co.,* 4 C. C. 471 (affirmed without opinion by the Ohio Supreme Court, 52 O. S. 623, 44 N. E. 1130).

There was nothing whatever in the record of that case which warranted the application of the *MacPherson* doctrine, even though the case was decided twenty two years before Judge Cardozo wrote his famous opinion.

But the interesting thing is that upon examination of the opinion, we find that the Circuit Court of Ohio after a rather complete analysis of the problem, gave express approval to the old New York case of *Devlin v. Smith,* 89 N. Y. 470 which was a case of harm caused by

a defective "structure." It cited with approval from the *Devlin* case, the following language:

> "The liability of the builder or manufacturer for such defect is, in general, only to the persons with whom he contracted. But, notwithstanding the rule, liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is the natural and probable consequence of its use. * * *
>
> * * * * *
>
> (and with reference to the structure which collapsed—a scaffold)
>
> A stronger case, where misfortune to third persons, not parties to the contract, would be the natural and necessary consequence of the builder's negligence, can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life."

Then, after a further review of the Ohio cases, and some authorities from other states, the opinion in the *Bailey* case proceeds:

> "The rules of law that we gather from these, are substantially these: The owner of the property is holden to be liable to persons coming upon the property, if he keeps it in such a negligent condition that a person is injured by some negligent act of his. * * *
>
> A person is also liable who handles any dangerous compounds like poisons as we have seen in the *Guarnieri* case, **or erects a dangerous structure as in the Devlin case, supra.** * * *" (pp. 481-483.) (Emphasis ours.)

In other words, it turns out, upon examination, that the *Bailey* case is, in this dictum, squarely in accord with the decision of the Circuit Court of Appeals in our case at bar, rather than exactly to the contrary as claimed by the petitioners.

2. Under recent decisions of the Ohio Supreme Court huge structures, like Tank No. 4, are chattels.

There have been some recent and rather curious decisions of the Supreme Court of Ohio in the field of taxation that have dealt with this problem as to when a structure like Tank No. 4 is to be regarded as a "fixture" and when it is to be considered merely a "chattel" or "personalty."

In a series of cases decided on the same day (1945), towit, *Zangerle v. Oil Co.*, 144 Oh. St. 506, 60 N. E. 2d 52; *Oil Co. v. Zangerle*, 144 Oh. St. 523, 60 N. E. 2d 59; and *Zangerle v. Steel Corp.*, 144 Oh. St. 529, 60 N. E. 2d 170, the Supreme Court of Ohio held that large segments of an oil refinery are personalty; as is also a continuous steel strip mill which covered 21 acres, the "largest and fastest mill of its kind in the world." (p. 547)

With reference to the oil refinery, the dissenting opinion pointed out:

> "We have in question, among other items, steel structures rising high into the air and weighing many tons, which are held herein by the majority to be personal property. These structures are set on and bolted to specially designed and constructed concrete foundations, and are connected with other parts of the refinery by pipes or conduits some of which run over ground and others underground through tunnels. Unprotected from the weather by any housing and standing there as permanent rather than temporary edifices on land which has been devoted to oil-refinery purposes over a period of many years, these structures constitute an essential portion of a large refinery system."

Under the decisions referred to, it would appear that the storage tanks were clearly personal property, rather than fixtures; and there is therefore no reason to be concerned about the hypothetical distinction between the liability for negligent manufacture of chattels, and the

negligent construction of permanent structures which the petitioners are seeking to argue.

IN CONCLUSION.

In conclusion we submit that petitioners have shown no valid reason why certiorari should be granted in this case.

But if the Court should conclude that certiorari ought to be allowed, we trust the Court will include within its order a consideration of Questions I and II respecting the law of "absolute nuisance."

Respectfully submitted,

MARVIN C. HARRISON,
HARRISON, THOMAS, SPANGENBERG & HULL,
PREMO J. COLUMBUS,
Attorneys for Respondent.